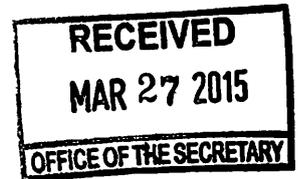


**UNITED STATES OF AMERICA**  
**before the**  
**SECURITIES AND EXCHANGE COMMISSION**



In The Matter of the Application of:

**SECURITIES INDUSTRY AND FINANCIAL  
MARKETS ASSOCIATION**

for Review of Actions Taken by  
Self-Regulatory Organizations

Admin. Proc. File No. 3-15350

The Honorable Brenda P. Murray,  
Chief Administrative Law Judge

**THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION'S  
OPPOSITION TO THE EXCHANGES' MOTION FOR AN ORDER FINDING WAIVER  
OF PRIVILEGE AND COMPELLING PRODUCTION OF PRIVILEGED DOCUMENTS**

## INTRODUCTION

Pursuant to Rule 154(b) of the Securities and Exchange Commission's Rules of Practice, the Securities Industry and Financial Markets Association ("SIFMA"), by undersigned counsel, hereby opposes the Motion of NYSE Arca, Inc. and the Nasdaq Stock Market LLC for Order Finding that SIFMA Waived Privilege and Compelling Production of Documents Withheld as Privilege, dated March 18, 2015 (the "Motion"). The Motion is meritless and should be denied.

As SIFMA's privilege log (attached as Exhibit A) describes, *all* of the documents that were withheld as privileged relate exclusively to the declarations that were submitted in this proceeding in support of SIFMA's associational standing. Courts have repeatedly held that such documents, created during and in connection with litigation, do not need to be separately listed and described in a privilege log. Moreover, contrary to the Exchanges' trumped up claims, they have suffered no conceivable prejudice from SIFMA's privilege log. All of the documents that were withheld relate exclusively to SIFMA's associational standing—an issue the Chief ALJ has already decided—and have nothing to do with the hearing on the merits. The Exchanges may not agree with the Chief ALJ's jurisdictional ruling, but that is no basis to continue litigating an issue that has already been decided, at the expense of the Chief ALJ's and the parties' preparation for the upcoming hearing on the merits. The Motion should be denied.

## ARGUMENT

SIFMA's categorical privilege log supports its claim of privilege over the documents at issue.<sup>1</sup> The log shows that the documents are withheld under attorney-client privilege and the

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<sup>1</sup> A categorical privilege log provides descriptions of documents withheld as privileged in terms of document categories rather than on a document-by-document basis. *SEC v. Thrasher*, No. 92 CIV. 6987 (JFK), 1996 WL 125661, at \*1 (S.D.N.Y. March 20, 1996) (rejecting the Commission's claim of entitlement to an itemized privilege log for documents "ordinarily covered by the work-product rule" because additional details would provide no benefit, and

attorney-work product doctrine because they involve documents authored by, prepared for, or received by SIFMA's attorneys for the purpose of litigating SIFMA's associational standing in this proceeding. *See* Ex. A. In other words, the log shows that the withheld documents were prepared in the course, and for the purpose, of this very litigation.

As numerous courts have held (and common sense would indicate), such documents are privileged and ordinarily do not necessitate a privilege log at all, let alone a detailed log separately listing and describing each document. *See, e.g., Prism Techs., LLC v. Adobe Sys., Inc.*, No. 8:10CV220, 2011 WL 5523389, at \*2 (D. Neb. Nov. 14, 2011) (recognizing that privilege logs are only necessary for documents created prior to litigation and not "in cases where attorney-client privilege is evident"); *Ryan Inv. Corp. v. Pedregal De Cabo San Lucas*, No. C 06-3219, 2009 WL 5114077 (JW) (RS), at \*3 (N.D. Cal. Dec. 18, 2009) ("[C]ounsel's communications with the client and work product developed once the litigation commences are presumptively privileged and need not be included on any privilege log."); *United States v. Bouchard Transp.*, No. 08-cv-4490 (NGG) (ALC), 2010 WL 1529248, at \*2 & n.1 (E.D.N.Y. April 14, 2010) (holding that "privilege logs are commonly limited to documents created before the date litigation was initiated" and that the plaintiff was only "legally required to produce a privilege log for all documents created before the date this lawsuit was filed"); *Capitol Records, Inc. v. MP3tunes, LLC*, 261 F.R.D. 44, 51 (S.D.N.Y. 2009) (concluding that communications with counsel after litigation commences reflect legal strategy and do not require a privilege log); *Teledyne Instruments, Inc. v. Cairns*, No. 6:12-cv-854-Orl-28TBS, 2013 WL 5781274, at \*15-16 (M.D. Fla. Oct. 25, 2013) (recognizing case law and federal district courts' local rules that

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describing categorical logs as appropriate when "(a) a document-by-document listing would be unduly burdensome and (b) the additional information to be gleaned from a more detailed log would be of no material benefit to the discovering party in assessing whether the privilege claim is well grounded").

“exempt[] post-complaint communications from the scope of discovery” and only requiring a categorical privilege log for certain pre-litigation documents); *see also Grider v. Keystone Health Plan Cent., Inc.*, 580 F.3d 119, 139 n.22 (3d Cir. 2009) (agreeing that “a rule requiring creation of an ongoing log of all post-complaint privileged communications would have a chilling effect on the attorney-client relationship” and underscoring that “a privilege log may not be required for communications with counsel that take place after the filing of a law suit”).

Consistent with this case law, there is no basis for requiring SIFMA to produce a detailed, document-by-document log. As is apparent on the face of SIFMA’s privilege log, all of the documents that were withheld relate to SIFMA’s jurisdictional declarations and associated briefing in this proceeding—the September 19, 2013 declaration by SIFMA’s General Counsel filed in connection with the preliminary procedural briefing ordered by the Commission, and the July 2014 declarations submitted by SIFMA members in connection with the jurisdictional briefing before the Chief ALJ. Based on these declarations, the Chief ALJ held on October 20, 2014, that SIFMA has associational standing. Order on the Issues of Jurisdiction and Scheduling, Release No. 1921 (holding that “SIFMA has provided a reasonable and persuasive response to what the Commission required it to show to establish associational standing”).

For each of these events, SIFMA and its members solicited and received legal advice from counsel.<sup>2</sup> It is these communications that are reflected in SIFMA’s privilege log.<sup>3</sup> Because

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<sup>2</sup> It is black letter law that communications between outside and in-house counsel are privileged communications between attorney and client, with in-house counsel acting as the client. *See, e.g., Natta v. Zletz*, 418 F.2d 633, 637 (7th Cir. 1969); *McCook Metals L.L.C. v. Alcoa Inc.*, 192 F.R.D. 242, 255 (N.D. Ill. 2000); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 37 (D. Md. 1974); *Macario v. Pratt & Whitney Canada, Inc.*, Civ. A. No. 90-3906, 1991 WL 6124, at \*2 (E.D. Pa Jan. 17, 1991); *Am. Optical Corp. v. Medtronic, Inc.*, 56 F.R.D. 426, 430 (D. Mass. 1972). Courts routinely hold that communications between counsel for an association and the association’s members are privileged, particularly where, as here, the association and its members share a common legal interest. *See, e.g., A & R Body Specialty & Collision Works, Inc.*

privilege logs for such litigation documents are unnecessary, SIFMA has more than adequately supported its claims of privilege. There is no basis for requiring the production of a more detailed log, and certainly no basis for finding a waiver of privilege.

Nor is there any basis for the claim that SIFMA's privilege log has "prejudiced the Exchanges" in their ability to prepare for the upcoming hearing. Mot. 4–5. Nowhere in their Motion do the Exchanges explain why they could possibly need more information about privileged communications relating to already-resolved jurisdictional issues. To the extent they intend to try to relitigate jurisdiction, that effort is doubly misguided: The Chief ALJ has already decided that issue, and in so doing she rejected the Exchanges' efforts to obtain discovery regarding the jurisdictional declarations. *See* Nasdaq Br. Regarding Jurisdiction 1 (Aug. 18, 2014); NYSE Arca Br. Regarding Jurisdiction 9 & n.15 (Aug. 18, 2014); Jurisdiction Order 7–10. And when the Exchanges more recently sought discovery to assess jurisdictional issues, the Chief ALJ responded: "we're over that now" and "we're at a new phase now." Dec. 18, 2014 Pre-Hearing Tr. at 15:12–13.

Moreover, the Exchanges have no need for the withheld documents to prepare for the

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*v. Progressive Cas. Ins. Co.*, No. 3:07CV929 (WWE), 2013 WL 6044333, at \*10–11 (D. Conn. Nov. 14, 2013) (finding common interest doctrine protected communications between trade association counsel and members); *Robinson v. Tex. Auto. Dealers Ass'n*, 214 F.R.D. 432, 453 (E.D. Tex. 2003) (finding members of trade association of auto dealers "clearly shared a common legal interest"), *vacated in part sub nom. In re Tex. Auto. Dealers Ass'n*, No. 03-40860, 2003 WL 21911333 (5th Cir. July 25, 2003); *United States v. Ill. Power Co.*, No. 99-CV-0833-MJR, 2003 WL 25593221, at \*4 (S.D. Ill. Apr. 24, 2003) (finding communications privileged where association members "were joined in a common interest in current and potential litigation").

<sup>3</sup> Communications involving the preparation of declarations or affidavits, including the provision of information for such preparation, are quintessential legal communications protected by the attorney-client privilege. *See, e.g., Winans v. Starbucks Corp.*, No. 08 Civ. 3734 (LTS) (JCF), 2010 WL 5249100, at \*2–3 (S.D.N.Y. Dec. 15, 2010); *Ideal Elec. Co. v. Flowserve Corp.*, 230 F.R.D. 603, 608 (D. Nev. 2005); *Randleman v. Fid. Nat'l Title Ins. Co.*, 251 F.R.D. 281, 287 (N.D. Ohio 2008).

hearing on the merits. The merits of this proceeding involve whether *the Exchanges* were “subject to significant competitive forces in setting the terms of [their fee] proposal[s]” and whether *those terms* are “are equitable, fair, reasonable, and not unreasonably discriminatory.” 73 Fed. Reg. 74,770, 74,781 (Dec. 9, 2008); *see also* Order Establishing Procedures and Referring Applications for Review to Administrative Law Judge for Additional Proceedings, Exchange Act Release No. 72182 (May 16, 2014) (recognizing the same). The withheld documents are immaterial to these questions. And the Exchanges could not need these documents for cross-examination or rebuttal because, as reflected in its exhibit list, SIFMA does not intend to rely on the testimony of any SIFMA members. There is no conceivable prejudice.

Indeed, if anything is prejudicial, it is the Exchanges’ own baseless Motion. As the Exchanges themselves have stated previously, an unnecessary diversion of “resources and attention away from addressing this significant case on the merits” is burdensome and wasteful. Letter from Joshua Lipton & Douglas Henkin, Exchanges’ Counsel, to the Honorable Brenda P. Murray, Chief Administrative Law Judge, SEC 4 (Dec. 17, 2014) (“Exchanges Letter”).<sup>4</sup> But that is precisely the effect, if not the purpose, of the Exchanges’ Motion—to divert the Chief ALJ’s and the parties’ time and attention to a meaningless procedural skirmish and away from the important merits issues in this case. Given the nature of the documents withheld, SIFMA’s privilege log is fully adequate, and producing a more detailed log would serve no purpose other than to waste SIFMA’s time and resources as it prepares for the hearing.

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<sup>4</sup> Indeed, for this reason and in light of the expedited period in which the parties had to accomplish coinciding discovery and pre-trial obligations, SIFMA did not ask the Exchanges to produce privilege logs, even though both Exchanges had represented that they held privileged documents responsive to SIFMA’s subpoena. Dec. 30, 2014 Pre-Hearing Tr. at 83:16–23 (NYSE Arca stating that a “fairly extensive privilege analysis” would be required to respond to certain subpoena requests); Exchanges Letter 2 (claiming the Exchanges’ production of documents would have to be “reviewed for potential responsiveness and privilege” which could take “ninety days or more” to complete).

**CONCLUSION**

For these reasons, the Exchanges' Motion is meritless and should be denied.

Dated: March 26, 2015

Respectfully submitted,

SIDLEY AUSTIN LLP



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**UNITED STATES OF AMERICA**  
**before the**  
**SECURITIES AND EXCHANGE COMMISSION**

In The Matter of the Application of:

SECURITIES INDUSTRY AND FINANCIAL  
MARKETS ASSOCIATION

for Review of Actions Taken by  
Self-Regulatory Organizations

Admin. Proc. File No. 3-15350

The Honorable Brenda P. Murray,  
Chief Administrative Law Judge

**CERTIFICATE OF SERVICE**

I hereby certify that on March 26, 2015, I caused a copy of the foregoing Securities Industry and Financial Markets Association's Opposition to the Exchanges' Motion for an Order Finding Waiver of Privilege and Compelling Production of Privileged Documents to be served on the parties listed below via First Class Mail:

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Dated: March 26, 2015

 <sup>1 KMH</sup>  
Eric D. McArthur

# **Exhibit A**

**Privilege Log of the Securities Industry and Financial Markets Association, March 11, 2015**  
*In the Matter of the Application of Securities Industry and Financial Markets Association*  
 Admin. Proc. File No. 3-15350

<b>Date</b>	<b>Custodian</b>	<b>Description</b>	<b>Subpoena Item</b>	<b>SIFMA Attorneys (Author, Recipient, Custodian)</b>	<b>Privilege Category</b>
09/19/13	MacGregor, Melissa	Documents concerning the preparation of SIFMA's declaration in support of its application to set aside rule changes in Admin. Proc. File No. 3-15350	9	MacGregor, Melissa (SIFMA attorney); McArthur, Eric (Sidley Austin)	Attorney-Client Communication; Attorney Work Product
05/19/14 – 10/21/14	MacGregor, Melissa	Documents concerning the preparation of Relevant Member jurisdictional declarations and briefing concerning SIFMA's satisfaction of jurisdictional requirements in support of SIFMA's application to set aside rule changes in Admin. Proc. File No. 3-15350, and concerning the Order on the Issues of Jurisdiction and Scheduling, Release No. 1921	15	MacGregor, Melissa (SIFMA attorney); McArthur, Eric (Sidley Austin); Phillips, Carter (Sidley Austin); Rogers, HL (Sidley Austin); Schiller, Lowell (Sidley Austin)	Attorney-Client Communication; Attorney Work Product